Schnelli Enterprises, Inc. d/b/a Cellar Restaurant *and* Hotel & Restaurant Employees & Bartenders' Union of Long Beach & Orange County, Local 681, AFL-CIO, chartered by Hotel and Restaurant Employees and Bartenders International Union. Case 21-CA-19582

July 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 24, 1982, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge has found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with requested relevant bargaining information and by failing on and after August 26, 1980, to meet and negotiate in good faith with the Union as the certified bargaining representative of Respondent's employees. We find merit, however, in Respondent's exceptions to the Administrative Law Judge's remedial recommendation that the Union's initial year of certification begin anew on the date Respondent resumes bargaining in good faith.

Absent flagrant violations[1] or a respondent employer's history of failing to reach bargaining agreements with unions,[2] the Board's traditional remedial practice has been to extend a union's certification year only by that part of the year remaining when unfair labor practices interrupt prior good-faith bargaining.[3] In this case, Respondent fulfilled its bargaining obligation under Section 8(d) of the Act for approximately 8 months, from the Union's certification on November 30, 1979, until August 4, 1980, when Respondent unlawfully failed to honor or even respond to the Union's request for relevant bargaining information. Accordingly, to place Respondent and the Union in the bargaining posture they would have been in but for Respondent's unlawful conduct, we direct that, upon the resumption of bargaining in good faith and for 4 months thereafter, Respondent must regard the Union as if the initial year of certification has not yet expired.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Schnelli Enterprises, Inc. d/b/a Cellar Restaurant, Fullerton, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] *Southside Electric Cooperative, Inc.*, 243 NLRB 390 (1979).

[2] *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978).

[3] *Mammoth of California, Inc.*, 253 NLRB 1168 (1981); *Pride Refining, Inc.*, 224 NLRB 1353 (1976); *Haymarket Bookbinders, Inc.*, 183 NLRB 121 (1970).

[4] This remedy does not, of course, mean that Respondent's duty to bargain will automatically terminate upon expiration of the additional 4-month period. See, e.g., *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

DECISION

STATEMENT OF THE CASE

DAVID P. MCDONALD, Administrative Law Judge: This case was heard before me at Los Angeles, California, on June 18, 1981, pursuant to a complaint issued by the Regional Director for Region 21 of the National Labor Relations Board on November 7, 1980, which was based on a charge filed on September 24, 1980, by Hotel & Restaurant Employees & Bartenders' Union of Long Beach & Orange County, Local 681, AFL-CIO, chartered by Hotel and Restaurant Employees and Bartenders International Union, herein called the Union.[1] The complaint alleges that Schnelli Enterprises, Inc. d/b/a Cellar Restaurant, herein called Respondent, engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine the witness, to argue orally, and to file briefs. The General Counsel chose to present a final oral argument and not file a brief. Counsels for the the Charging Party and the Respondent chose to file briefs and not give closing arguments.

Upon the entire record, my observation of the witness, and consideration of the oral argument and the submitted briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent admitted it is a California corporation engaged in the preparation and serving of meals at its restaurant located at 305 North Harbor Boulevard, Fullerton, California. In the normal course and conduct of

[1] All dates herein refer to 1980 unless otherwise noted.

its business operations, the Respondent annually derives gross revenues in excess of $500,000 and annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, the Respondent admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to furnish information concerning the rates of pay of its cooks and bartenders and their job classifications and, further, by engaging in dilatory and evasive tactics and surface and bad-faith bargaining by failing to attend a scheduled negotiation meeting, failing to inform the Union why the Respondent refused to sign an agreement, and conditioning its offer to resume negotiations with the Union on a discussion of the employees' petition not to be represented by the Union. In its answer, the Respondent denied that it violated the Act.

B. *The Representation Proceeding*

1. The unit

All parties agreed that the following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All waiters, waitresses, bus help, cooks, kitchen help, bartenders, porters, dishwashers, doormen and all other employees employed by the Employer at its facility located at 305 North Harbor Boulevard, Fullerton, California; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On January 17, 1979, a majority of the employees of the Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with the Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 30, 1979. The Union continues to be the exclusive representative within the meaning of Section 9(a) of the Act.

C. *Facts*

David L. Schultz was the sole witness who appeared at this hearing. He has served as an officer of the Union for 15 to 20 years. During the last 4 years he has been its executive secretary-treasurer.

In anticipation that the Union would be certified, Schultz sent a letter, dated October 10, 1979, to Timothy F. Ryan, the Respondent's attorney, enclosing four signed copies of a proposed collective-bargaining agreement, in booklet form, titled "Wage Scale and Working Agreement Contract A Effective March 1, 1979." In the letter he suggested that, if the agreement met with the Respondent's approval, it should sign each copy and return two to Schultz. Three negotiating meetings followed on December 28, 1979, and February 1 and 15, 1980. Each meeting was held in Ryan's office and was attended by Ryan, Louis Schnelli (owner of the Respondent's Restaurant), and Schultz, the Union's negotiating representative. The meetings were described as friendly and informal.

The first meeting, on December 28, 1979, lasted about 1 hour. The negotiations were limited to reviewing the Union's proposed contract that had been submitted by mail on October 10, 1979. The meeting covered wages, health benefits, pensions, the union-security clause, and various other provisions of "Contract A." The Employer did not like the security clause.

The second meeting, on February 1, also lasted about 1 hour. Initially, Schultz testified that they discussed the same subjects which were addressed during the December meeting. However, on cross-examination he admitted that he handed Ryan a second union proposal. It was also in booklet form and was titled "Wage Scale and Working Agreement Contract Effective March 1, 1977." He referred to this 1977 contract as "our standard agreement throughout the area." Schultz testified that he could not recall if he told Ryan that he was withdrawing the previously mailed 1979 contract. He assumed that both sides realized, when he handed the Respondent the 1977 contract, that automatically the 1979 contract was withdrawn. In reference to the 1977 contract, Schultz told them "that they should take a look at this one, this contract; that this is the real world, and that they should give me a proposal based on this contract, meaning the second contract that I handed them." Earlier in his testimony, before the 1977 contract was mentioned, he said, "At this meeting [February 1, 1980], I asked the Employer and his representative to give me a proposal based upon their best efforts, and something that I could look at so I would know where we were in the scheme of things, and they said they would."

Subsequently, Ryan mailed the Respondent's proposal for a collective-bargaining agreement to Schultz on February 6.

The third and final meeting, on February 15, lasted only 10 minutes. Schultz informed the Respondent that he had reviewed its proposed collective-bargaining agreement and he was very disappointed since he did not feel it was a serious or realistic proposal. Schultz suggested "that rather than me give them a counter-proposal, would they be kind enough to go back and rethink

their proposal and give me one that was a little more realistic." Ryan and Schnelli were described as friendly. Schultz summarized, "They felt friendly about that, and they thought maybe they could. And I left it at that. They were going to give me another proposal at that time." Later on cross-examination the witness was asked whether "their response to that was they that would look at their position again." Schultz answered, "Yes, it was friendly, and that they could look at it again." Neither Ryan nor Schnelli made any statement during this third meeting that would indicate they were withdrawing the Respondent's proposal.

A week or two after the third meeting, Schultz telephoned Ryan in an effort to determine the current status of the Respondent's proposal. Ryan explained "that Mr. Schnelli had had a change of heart, and that he was very unhappy about something. . . . That was it, that he wasn't going to give me another offer, but that that was it . . . that is the best he could do." Again there was no mention of a withdrawal of the Respondent's proposal. The conversation was concluded when Ryan answered that he thought Schnelli knew the consequences of his decision.

Ealier in March a meeting was scheduled for the unit member employees of Cellar Restaurant for the purpose of voting on the Respondent's proposed contract. None of the bargaining unit employees attended the meeting. On March 21, the executive board of the Union approved the Respondent's proposed collective-bargaining agreement. On behalf of the Union and the Respondent's employees, Schultz signed the contract. The parties stipulated that the Union then hand delivered the said contract to Schnelli at his restaurant on March 26. Schnelli did not sign the contract at that time, since he wished to first confer with his attorney.

Approximately a week to 10 days later, Schultz called Ryan and asked for his copies of the contract. Ryan did not know if his client had signed the contract. They discussed the fact that the contract was silent as to the wages of the cook and bartender. In his testimony Schultz stated that was not a problem since the Union would accept the current wage rate that the Respondent was paying as the contract's beginning wage rate. In his affidavit Schultz claimed that he told Ryan they could work out the wage rate. In either case, the atmosphere between the parties remained friendly and Schultz was confident they would resolve the wages.

Thereafter, a second telephone conversation occurred between Ryan and Schultz approximately a week to 10 days later. Schultz testified. "I talked to Mr. Ryan after that, and he said that he had talked to Mr. Schnelli, and Mr. Schnelli had taken the position that that was no longer an offer; that he had withdrawn that offer." Schultz did not believe that during this conversation Ryan mentioned that the contract was incomplete.

Richard J. Cantrell, attorney for the Union, then forwarded the following letter, dated April 21, to Ryan:

> Mr. Schultz advises us he returned the Collective Bargaining agreement to the employer but has not received the signed copy back as yet. Mr. Schultz further advises that you have indicated the employer is now refusing to execute the agreement.
>
> Please advise as to the situation.
>
> If we do not receive the executed agreement within 15 days, we will request authorization to file an Unfair Labor Practice charge plus a breach of contract action including a request for punitive damages.

When the Union did not receive a response to the April 21 letter, it filed an unfair labor practice charge on June 23, 1980, alleging in part: "The employer refuses to execute or abide by the negotiated collective bargaining agreement." On July 31, 1980, the Regional Director for Region 21 informed Cantrell in a letter that he was refusing to issue a complaint in this matter for the following reasons:

> The evidence is insufficient to establish that the Employer violated the Act by refusing to execute and abide by an alleged collective-bargaining agreement. Rather, the evidence reveals that the contract executed by the Union was incomplete since there are two wage rates that have to be negotiated.

In correspondence dated July 24, 1980, Ryan informed Cantrell that:

> . . . it is the Employer's position that no final agreement on a collective bargaining agreement between Schnelli Enterprise, Inc. and your client has been reached.
>
> We also inform you that the Employer is and has been willing to continue its negotiations with the Union.

Thereafter, on August 4, 1980, the Union withdrew its charge "based upon the notification the company will negotiate the last pending items." On the same day, by letter, Cantrell informed Ryan of the following:

> The only items left to negotiate are the pay scale for cooks and bartenders. David Schultz of the Union will be contacting you to negotiate these items. Please obtain from the employer and advise Mr. Schultz of the current pay for the cooks and the bartenders.

Subsequently, by letter dated August 13, Ryan proposed three alternate dates for the resumption of their collective-bargaining negotiations. He also enclosed a copy of a petition, dated April 2, which was directed to Louis Schnelli and signed by all of his employees. The petition read:

> We, the employees of the Cellar Restaurant, asked you Mr. Schnelli, to help protect our interest in not wanting to be represented by any union by not signing any contract or proposal that would put us in the position, now or in the future, that we would have to work under any union contract.

In reference to this petition, Ryan concluded his August 13 letter by stating, "Prior to our next negotiation ses-

sion, we would appreciate a written statement of your position of this petition."

On August 15, the Union's counsel, Richard Cantrell, informed Ryan that August 26 was an agreeable date to resume negotiating over the only remaining unresolved questions; namely, the salaries of the cook and bartender. Again, the Union renewed its requests for data as to the current wages paid to the cook and bartender. Cantrell concluded his letter:

> You also inquired about the Union's position on some petition by employees.
>
> Since I have not seen your letter I will not respond. Since Mr. Schultz is represented by this office, we would appreciate it if you would conform to the ethics of the Bar Association and request opinions on such matters through counsel.
>
> We will see you on the 26th at 10:00 a.m.

Cantrell had not attended the three previous negotiating sessions. However, in keeping with his letter of August 15, Cantrell arrived at Schultz' office at the agreed hour. When neither Schnelli nor Ryan appeared, Schultz made several telephone calls to Ryan's office to no avail. In the days that followed, Schultz continued to attempt to contact Ryan by phone, but was always told that Ryan was in conference. Neither Ryan nor any other representative of the Respondent ever returned his calls.

On August 26, Ryan answered Cantrell's letter of August 15. He pointed out that Cantrell's previous correspondence had directed the Respondent to furnish the wage data to Schultz and therefore the Respondent was of the belief that they were to negotiate directly with Schultz. Ryan further denied that he had requested an "opinion." The purpose of his inquiry concerning the employees' petition was "directed solely at determining what effect if any, that petition should have on our negotiations. The issues raised by that petition are not insignificant and neither the Employer nor the Union would be well served by ignoring it." Ryan then expressed a desire to discuss the employee petition with Schultz prior to the next negotiating session and requested a written statement informing the Respondent as to whether or not it should continue to deal directly with Schultz or with Cantrell.

On September 24, the Union, through its counsel, filed the present unfair labor practice charge alleging that the Employer had engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. By letter dated October 27 to Ryan, the Union's counsel stated:

> When I returned from vacation I found you had called once on the above matter. I have returned your telephone call in the morning of October 24.
>
> I have been informed by the NLRB agent, you are waiting authorization to enter into negotiations with my client directly. You already have authorization to negotiate the contract with Mr. Schultz. You know that.
>
> You still have not informed Mr. Schultz of the rate's pay to cooks and bartenders. Please advise Mr. Schultz and this office in writing as to those rates at this time.

Apparently, there was no further communication between the parties. The Regional Director issued this complaint on November 7.

On June 18, 1981, at the conclusion of the hearing, the Respondent stipulated that neither the Respondent nor its attorney had given the Union the requested information concerning the wage rates and job classifications of the cooks and bartenders at any time since the negotiations began. At the hearing, in response to the General Counsel's *subpoena duces tecum*, the Respondent's attorney produced the papers, books, and records of the Respondent showing the names, dates of hire, and rates of pay of all of the Employer's cooks and bartenders who were employed during the period from April 1 to and including September 1, 1980.

D. *Analysis and Conclusions*

1. Credibility

Since David L. Schultz was the only individual who testified, his recollection of events remained uncontradicted by other testimony. However, a trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false. It is well settled that a witness' testimony may be contradicted by circumstances as well as by statements and that demeanor may be considered in such circumstances. *Operative Plasterers' & Cement Masons' International Association, Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147 (1973). After carefully reviewing the record and considering his demeanor I have concluded Schultz made an effort to provide an accurate and true account of the statements and events which spawned the present case. Unfortunately, he either suffered from an abundance of caution or a poor memory. At times his responses were vague and replete with, "I dont' recall." Such responses are often considered an indication of a lack of credibility. I do not believe that this is the case in the present matter. I find that Schultz made an honest effort to report the facts as he recalled them. Therefore, I generally credit his testimony. However, I discredit Schultz' recollection in those areas where his responses are vague and in conflict with the established facts derived from submitted documents and the reasonable inference drawn from the record.

2. Bad-faith bargaining

In general it is the position of the General Counsel and counsel for the Charging Party that the Respondent engaged in "bad-faith" bargaining and thus violated Section 8(a)(5) and (1) of the Act. The record traces the actions of the parties from the date of the Union's certification on November 30, 1979, to the date of the hearing on June 18, 1981. During this period the Respondent is charged with having committed a series of actions which the General Counsel argues demonstrates that it in fact

bargained in bad faith. In reviewing this series of events, it is likely that, considered individually, an event may not be a violation of Section 8(a)(5) and (1) of the Act. Viewed separately, at least some of these actions may be construed as acceptable hard bargaining by the Company or as insufficient standing alone to support a finding of a refusal to bargain. However, the courts have found that the totality of the circumstances may justify a finding of failure to bargain in good faith. *Queen Mary Restaurants Corp. and Q. M. Foods, Inc.* v. *N.L.R.B.*, 560 F.2d 403 (9th Cir. 1977). Accordingly, viewing the Respondent's actions cumulatively, I find that the totality of the evidence supports the charge that Schnelli Enterprises, Inc., did engage in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B.* v. *Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343 (9th Cir. 1978); *J. P. Stevens & Co., Inc.* v. *N.L.R.B.*, 623 F.2d 322, 326 (4th Cir. 1980).

The collective-bargaining meetings were described as friendly. Schultz had sumitted two proposed agreements and then received the Respondent's proposal on February 1. It was during their third meeting on February 15 that Schultz informed Schnelli and his attorney that their proposal was unrealistic and they should "rethink" it. There was no indication that the Respondent intended to withdraw the proposal and the Employer agreed to "look at their position again." The Respondent's statement was not an agreement that it would actually alter its only proposal.

A week or two later when Schultz telephoned, Ryan informed him that Schnelli was very unhappy and, "That was it, that he wasn't going to give me another offer, but that that was it . . . that is the best he could do." Again there was no mention of withdrawal of the Respondent's proposal. It should be noted that at this stage the Company's proposal was silent as to the wages of the cook and bartender. Considered alone, the fact that the Respondent did not elect to amend its proposal is not *per se* bad-faith bargaining.

Thereafter, the Union accepted what it previously had categorized as a not serious and a unrealistic proposal. Schultz signed the Respondent's proposal on March 21 and it was hand delivered to Schnelli on March 26. When Schnelli insisted on seeking the advice of his attorney before signing his own proposal, the matter was again delayed. A week or 10 days passed and Schultz heard nothing until he called Ryan, who did not know if his client had signed the agreement. They discussed the fact that the agreement was silent as to wages. Schultz was willing to accept the current wages. Since the atmosphere was very friendly, he was confident they could agree on the wages. Again a week to 10 days passed and Ryan did not call Schultz. Finally, after several attempts Schultz reached Ryan, who allegedly informed him that his client, Schnelli, had withdrawn the offer. I do not credit this portion of Schultz' testimony. After reviewing the documentation it appears unlikely either that Ryan stated the offer was withdrawn or that in fact Schnelli withdrew it. I reach this conclusion by examining Cantrell's letter of April 21 to Ryan, wherein he states: "Mr. Schultz further advises that you have indicated the employer is now refusing to execute the agreement." On June 23, 1980, the Union, through its attorney, Cantrell, filed an unfair labor practice charge, alleging: "The employer refused to execute or abide by the negotiated collective bargaining agreement." The Respondent's position was outlined in Ryan's correspondence to Cantrell dated July 24. No final agreement had been reached and the Employer was willing to continue its negotiations with the Union.

In his letter of August 4 to Ryan, Cantrell announced that the Union was prepared to negotiate the only remaining items left to negotiate, the pay scale for the bartender and the cook. To assist the Union in this area of bargaining, he requested that the Employer furnish the current pay for those two unit positions to Schultz, who would contiue to handle the negotiations on behalf of the Union. On several occasions thereafter, the Union renewed the request for the wage data. The Respondent never refused to furnish the information; it simply ignored the request. It was not until the day of the hearing, June 18, 1981, that the Respondent admitted it had not provided the requested material at any time since the beginning of their negotiations. In response to the General Counsel's *subpoena duces tecum*, the Respondent's attorney produced the papers, books, and records of the Respondent showing the names, dates of hire, and rates of pay of all of the Employer's cooks and bartenders who were employed during the period from April 1 to and including September 1, 1980. The information sought by the Union dealing with wages and employee job classifications is presumptively relevant. The Respondent offered nothing to rebut this presumption. *Maywood Do-Nut Co., Inc.*, 256 NLRB 507 (1981). Therefore, I conclude that the Respondent's failure to furnish the requested information to the Union, the certified representative of its employees, prior to the hearing constitutes a violation of Section 8(a)(5) and (1) of the Act. See also *The Bakery, Incorporated*, 259 NLRB 766 (1981); *Harvard Folding Box Co., Inc.*, 259 NLRB 686 (1981).

In his letter to Schultz dated August 13, Ryan suggested three alternate dates for the resumption of their collective-bargaining negotiations. In addition, he enclosed a copy of a petition signed by all of the employees of the Respondent, which in essence stated that they did not want the Union as their representative. Ryan's letter stated, "*Prior* to our next negotiation session, we would appreciate a written statement of your position on this petition." (Emphasis supplied.) The Union accepted the date of August 26 for the next collective-bargaining session, but did not provide the Respondent with the Union's view on the employee petition. Neither Schnelli nor Ryan appeared on the 26th. They did not call to cancel the meeting or provide an explanation for their absence. In reviewing the whole record there appears only three logical reasons for their absence. Their absence was either a dilatory tactic, they in fact conditioned their offer to resume negotiations on the discussion of the employees' petition, or both.

No one testified on behalf of the Respondent, nor provided an explanation as to why Schnelli and Ryan did not attend the meeting. However, the Respondent's brief asserts that a very careful reading of the various letters

provides the explanation. When Ryan's letter first raised the issue of the employees' petition, Cantrell informed Ryan by letter, dated August 15, that his office represented the Union and therefore Ryan should conform to the ethics of the Bar Association by directing all requests for *opinions* through counsel. The Respondent argues that this letter raised a doubt as to whether it could continue to deal directly with Schultz. I do not feel that this argument has any merit. Cantrell's letter of the 15th is not ambiguous. It clearly states, "*Mr. Schultz* is agreeable to negotiating the final items on the contract on August 26" in Schultz' office. The last sentence of the letter states, "*We* will see you on the 26th at 10:00 a.m." (Emphasis supplied.) Under the circumstances, "We" could only refer to Schultz and Cantrell. Any concern Ryan may have had should have been alleviated by the fact that Cantrell would be present at the negotiating session. If the Respondent's attorney was truly concerned, then he could have called or written Cantrell for clarification. There is no evidence to indicate that Ryan called Cantrell. It is true Ryan wrote a letter to Cantrell requesting "a written statement from you informing us as to whether or not we may continue to deal directly with Mr. Schultz." The letter is dated *August 26*, the same day Schnelli and Ryan failed to attend the resumed negotiating meeting. I find such a late inquiry to be a subterfuge, an obvious dilatory tactic. It is also very interesting to note that the same letter again raised the issue of the employees' petition:

> Your letter of August 15, 1980 is also incorrect in characterizing our inquiry regarding the Union's position on the employee petition as a request for an "opinion." Our inquiry was directed solely at determining what effect, if any, that petition should have on our negotiations. The issues raised by that petition are not insignificant and neither the Employer nor the Union would be well served by ignoring it.
>
> We would like to discuss the petition with Mr. Schultz *prior* to the next negotiation session. [Emphasis supplied.]

It would appear that this letter again raises the need to discuss the employees' petition as a condition to resumption of collective bargaining.

The law is well established that a union enjoys an almost conclusive presumption of majority support during the year following certification. Thus, an employer may not refuse to bargain during the 12-month period even though the employer is confident that the union has lost majority support. *N.L.R.B.* v. *Lee Office Equipment*, 572 F.2d 704 (9th Cir. 1978), enfg. 226 NLRB 826 (1976); *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279, fn. 3 (1972). This presumption of majority during the first 12 months is almost irrebuttable. The Surpreme Court in *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98 (1954), recognized certain "unusual circumstances" that may justify an employer's refusal to bargain even during the certification year. However, the facts in the present case do not fall within the "unusual circumstances" that have been recognized by either the Surpreme Court or the Board. In the present case the Union may well have lost the majority support of the Respondent's employees. The April 2, 1980, employee petition was signed by all of the employees and clearly stated that they did not want "to be represented by any union." When the Union called a contract ratification meeting none of the employees attended. In *Lee Office Equipment, supra*, the Ninth Circuit held, "It appears that the Union had in fact lost virtually all employee support at the time of the refusals to bargain. But evidence that employees have abandoned their certified union, without more, does not justify an employer's refusal to bargain during the certification year. *Brooks* v. *N.L.R.B., supra*, 348 U.S. at 103."

I find that the Respondent's failure to attend the August 26 collective-bargaining meeting, its failure to explain its absence, its various dilatory tactics, and its insistence on discussing the employees' April 2 petition indicate that the Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I recommend that the initial year of certification begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Bell & Howell Company*, 220 NLRB 881 (1975).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All waiters, waitresses, bus help, cooks, kitchen help, bartenders, porters, dishwashers, doormen, and all other employees employed by the Employer at its facility located at 305 North Harbor Boulevard, Fullerton, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in

the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 30, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid approriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing the Union's request for certain necessary and relevant information from on or about August 4, 1980, until the date of the hearing, June 18, 1981, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing on and after August 26, 1980, to meet and negotiate with the Union as the exclusive bargaining representative of its employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, the Respondent has interefered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The Respondent, Schnelli Enterprises, Inc. d/b/a Cellar Restaurant, Fullerton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to meet, negotiate, and bargain in good faith with Hotel & Restaurant Employees & Bartenders' Union of Long Beach & Orange County, Local 681, AFL-CIO, chartered by Hotel and Restaurant Employees and Bartenders International Union, as the exclusive bargaining representative of its employees in the following bargaining unit:

> All waiters, waitresses, bus help, cooks, kitchen help, bartenders, porters, dishwashers, doormen, and all other employees employed by the Employer at its facility located at 305 North Harbor Boulevard, Fullerton, California; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to bargain in good faith with the Union by not furnishing necessary and relevant requested information concerning wages and job descriptions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with Hotel & Restaurant Employees & Bartenders' Union of Long Beach & Orange County, Local 681, AFL-CIO, chartered by Hotel and Restaurant Employees and Bartenders International Union, as the exclusive representative of all the employees in the appropriate unit; furnish said labor organization with the current wage rates and job descriptions of the cooks and bartenders; and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Fullerton, California, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel & Restaurant Employees & Bartenders' Union of Long Beach & Orange County, Local 681, AFL-CIO, chartered by Hotel and Restuarant Employees and Bartenders International Union as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to furnish the above-named Union with necessary and relevant information it has requested with respect to all unit employees of Schnelli Enterprises, Inc. d/b/a Cellar Restaurant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all

employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All waiters, waitresses, bus help, cooks, kitchen help, bartenders, porters, dishwashers, doormen, and all other employees employed by the Employer at its facility located at 305 North Harbor Boulevard, Fullerton, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon the above-named Union's request, furnish the current wage rates and job descriptions of the cooks and bartenders.

SCHNELLI ENTERPRISES, INC. D/B/A CELLAR RESTAURANT